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Supreme Court, U.S.
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No. 00-691

IN THE

Supreme Court of the United States

WFAA-TV, INC. AND ROBERT RIGGS,

Petitioners,

v.

CARVER DAN PEAVY AND SALLY PEAVY,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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15 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR PETITIONERS 1

CONCLUSION 10

TABLE OF AUTHORITIES

Cases **Page**

Bartnicki v. *Vopper*, No. 99-1687, *cert. granted*, 120 S. Ct. 2716 (June 26, 2000) ..... passim
City of Erie v. *Pap's A.M.*, 120 S. Ct. 1382 (2000) 5
Cox Broadcasting Corp. v. *Cohn*, 420 U.S. 469 (1975) 4
Edenfield v. *Fane*, 507 U.S. 761 (1993) 6
Florida Star v. *B.J.F.*, 491 U.S. 524 (1989) 2-3
Forsyth County v. *Nationalist Movement*, 505 U.S. 123 (1992) 5
44 Liquormart, Inc. v. *Rhode Island*, 517 U.S. 484 (1996) 6
Greater New Orleans Broadcasting Council v. *United States*, 527 U.S. 173 (1999) 6
Ibanez v. *Florida Dept. of Business & Professional Reg.*, 512 U.S. 136 (1994) 6
Kratz v. *Kratz*, 477 F. Supp. 463 (E.D. Pa. 1979) 10
Lambert v. *California*, 355 U.S. 225 (1957) 9
Landmark Communications v. *Virginia*, 435 U.S. 829 (1978) 2, 3
Liparota v. *United States*, 471 U.S. 419 (1985) 8, 9
McDermott v. *Boehner*, No. 99-1709, *petition for cert. filed*, 68 U.S.L.W. 3686 (Apr. 25, 2000) 1-2
United States v. *Murdock*, 290 U.S. 389 (1933) 8
Raley v. *Ohio*, 360 U.S. 423 (1959) 9
Rubin v. *Coors Brewing Co.*, 514 U.S. 476 (1995) 6
Simon & Schuster, Inc. v. *Members of New York Crime Victims Bd.*, 502 U.S. 105 (1991) 4
Smith v. *Daily Mail*, 443 U.S. 97 (1979) 3
Thompson v. *Dulaney*, 970 F.2d 744 (CA10 1992) 9
United States v. *O'Brien*, 391 U.S. 367 (1968) 4
United States v. Vopper, No. 99-1728, *cert. granted*, 120 S. Ct. 2716 (June 26, 2000) ..... passim
United States v. *Wuliger*, 981 F.2d 1497 (CA6 1992), *cert. denied*, 510 U.S. 1191 (1994) 9
Williams v. *Poulos*, 11 F.3d 271 (CA1 1993) 9

Statutes **Page**

18 U.S.C. § 2511 ..... passim

Miscellaneous **Page**

Supreme Court Rule 29.4(c) 7
G. R. Blakey and J. A. Hancock, *A Proposed Electronic Surveillance Control Act*, 43 NOTRE DAME LAWYER 657 (1968) 8
Hard of Hearing, NEWSWEEK, Dec. 13, 1999, p. 78 6

REPLY BRIEF FOR PETITIONERS

1. The United States agrees with petitioners WFAA and Riggs that, with respect to the first question presented – whether the imposition of civil liability on a media defendant under 18 U.S.C. § 2511(1)(c) and (d), and a parallel Texas state wiretap statute, for using or disclosing the contents of illegally intercepted communications violates the First Amendment – this Court should hold this petition in abeyance pending the disposition of *Bartnicki* v. *Vopper*, No. 99-1687, and *United States* v. *Vopper*, No. 99-1728, *cert. granted*, 120 S. Ct. 2716 (June 26, 2000) (oral argument Dec. 5, 2000).

The United States contends that this case differs from Nos. 99-1687 and 99-1728 because here petitioners supposedly "were directly associated with ongoing interceptions," although "[t]he precise extent of petitioners' involvement is unresolved, as is the precise effect of petitioners' actions on the Harmans' surveillance activities." Govt. Opp. Cert. at 8. Notably, the United States does not suggest that these factual issues are a reason to deny the petition. Nor could the United States persuasively advance such a suggestion, in light of the Fifth Circuit's holding that none of those factual issues prevented it from addressing the First Amendment question on the merits. Pet. App. 33a. By the same token, this Court will also be able to reach the constitutional issue in this case based on the record below.

Even if the factual issues identified by the Fifth Circuit were relevant to the ultimate merits of this case, a "hold" would still be appropriate so that this Court's decision in *Bartnicki* articulating the governing First Amendment standard can be properly applied in this case to WFAA and Riggs, after whatever additional factfinding was warranted. By comparison, the United States has asked this Court to hold the petition in *McDermott* v. *Boehner*, No. 99-1709, even though that case also raises questions about the role of the defendant in the alleged wrongdoing. See *Boehner* v. *McDermott*, 191 F.3d 463, 476 (D.C. Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3686 (U.S. Apr. 25, 2000) ("By accepting the tape from the Martins,

McDermott participated in their illegal conduct."); *Bartnicki* v. *Vopper*, 200 F.3d 109, 128 (CA3 1999) ("McDermott was more than merely an innocent conduit."). The private respondents are simply incorrect when they assert that the defendant in *Boehner* "had nothing to do with the illegal interception." Peavy Opp. Cert. at 8.

It should be immaterial whether WFAA and Riggs are deemed to be involved in some capacity in the interception, for the proper First Amendment analysis must not be allowed to turn on whether the media defendant was on notice of, or have participated in, the underlying illegal interception. Any person who intercepts a wire or electronic communication, or procures another person to do so, is subject to punishment under Section 2511(1)(a), 18 U.S.C. § 2511(1)(a). The availability of separate sanctions under that section for the act of interception provides *less* reason, not *more*, to punish communicative activities protected under the First Amendment. While media defendants may be punished for their role in the interception, they should never be punished for exercising their First Amendment rights.

In both *Landmark Communications* v. *Virginia*, 435 U.S. 829 (1978), and *Florida Star* v. *B.J.F.*, 491 U.S. 524 (1989), for example, the media defendant could have been deemed a "participant" in the underlying wrongdoing, yet this Court held in each case that the media defendant was protected by the First Amendment. In *Landmark*, this Court held that Virginia could not punish a newspaper that had breached the confidentiality of proceedings before a commission on judicial misconduct, even though the newspaper was aware of a Virginia statute prohibiting publication of information that had been provided by a third party in violation of state law. 435 U.S. at 830 n.1, 832. In *Florida Star*, this Court reversed the imposition of civil damages liability against a newspaper that published a rape victim's name in violation of a state statute. The name had been disclosed, in violation of state law, by a Sheriff's Department employee. 491 U.S. at 527, 536. The newspaper was aware, as evidenced by signs posted in the newsroom, that "the names of rape victims

were not matters of public record, and were not to be published." *Id.* at 546 (White, J., dissenting). Nonetheless, this Court warned that the press could not be expected to shoulder "the onerous obligation of sifting through government press releases, reports, and pronouncements to prune out material arguably unlawful for publication." *Id.* at 536.

Therefore, the factual issues identified by the Fifth Circuit would not be relevant to the proper application of First Amendment principles, even if those factual issues were resolved adversely to petitioners.

2. The private respondents advance a number of merits arguments in defense of the statutes at issue in this case. Peavy Opp. Cert. at 10-21. None of these is a reason to deny certiorari. Moreover, none has merit. This case should be decided according to a simple, bright line rule: if a journalist breaks the law to obtain information, she is subject to whatever generally applicable legal penalties may be triggered by the act of misappropriation. However the journalist has obtained information, she may be punished only for any impropriety in obtaining it, and not for the separate decision to publish it, absent a countervailing governmental interest of the highest order.

This Court has held that, where the press manages to obtain otherwise confidential information, it cannot be prevented from publishing it – or be punished for having done so. See *Florida Star* v. *B.J.F.*, 491 U.S. 524, 536 (1989); *Smith* v. *Daily Mail*, 443 U.S. 97, 101-02 (1979); *Landmark Communications* v. *Virginia*, 435 U.S. 829, 837 (1978). This rule does not depend on whether the statute invoked to prevent or punish publication is content-based or content-neutral. Rather than focusing on content discrimination, this Court has emphasized the need to resolve in favor of speech the conflict between truthful reporting and government-protected privacy interests. See, *e.g.*, *Florida Star*, 491 U.S. at 530.

Nor is intermediate rather than strict scrutiny appropriate, despite what the private respondents contend. Peavy Opp. Cert.

13. In *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975), this Court expressly found inapplicable the intermediate scrutiny of *United States* v. *O'Brien*, 391 U.S. 367, 376-77 (1968): "The Georgia cause of action for invasion of privacy through public disclosure of the name of a rape victim imposes sanctions on pure expression – the content of a publication – and not conduct or a combination of speech and nonspeech elements that might otherwise be open to regulation or prohibition." 420 U.S. at 695.

Even if the rule of *Florida Star* did not apply here, Section 2511(1)(c) and Section 2511(1)(d) would be subject to strict scrutiny under conventional First Amendment doctrine because they are, in any event, content-based prohibitions on speech. Although the matter was not highlighted during oral argument in *Bartnicki* on Dec. 5, 2000, they do not in fact operate in a mechanical fashion as a straightforward ban on the verbatim broadcast of tapes of intercepted communications. Instead, Title III requires a court to examine the communicative substance of what a defendant says in order to determine whether it "uses" or "discloses" "the contents of" an illegal interception. For example, in this case the Fifth Circuit held that petitioners could be held liable under Title III even though WFAA did not play or even mention any intercepted tapes in the television broadcasts. Pet. App. 23a-24a.

In an analogous way, the New York "Son of Sam" law at issue in *Simon & Schuster, Inc.* v. *Members of New York Crime Victims Bd.*, 502 U.S. 105 (1991), was content-based because it was "directed only at works with a specified content," *id.* at 116 – namely, those manifesting a defendant's "thoughts, feelings, opinions or emotions regarding [his] crime." *Id.* at 109. Just as the New York statute required a court to dissect the content of a book or movie in order to determine whether it expressed a defendant's knowledge about his past misdeeds, Title III requires a court to examine the communicative substance of a broadcast or publication to determine whether it "uses" or "discloses" "the contents of" a past misdeed (the fruits of an intercepted communication). Indeed, Title III is more objectionable, in First

Amendment terms, than the "Son of Sam" law. Title III does not merely prohibit a person who knows of an illegal interception from pocketing the proceeds of that crime; Title III flatly prohibits the person from "using" or "disclosing" the *informational* "contents" (18 U.S.C. § 2511(1)(c), (d)) flowing from the interception.

Moreover, Title III's purpose is likewise inextricably linked to the content of the speech proscribed. Title III is avowedly aimed at preventing the psychic harm associated with the disclosure of improperly obtained private facts that a telecommunications user wishes to shield from public view. Far from supporting the law, the interests purportedly served by Section 2511(1)(c) and Section 2511(1)(d) reveal the inevitably content-based nature of the statute. These interests stem from the communicative impact of speech and nothing but that impact – what information it expresses and how the audience would understand it. Yet this Court has instructed that "reaction to speech is not a content-neutral basis for regulation." *Forsyth County* v. *Nationalist Movement*, 505 U.S. 123, 134 (1992); see also *City of Erie* v. *Pap's A.M.*, 120 S. Ct. 1382, 1391 (2000) (plurality opinion) ("If the government interest is related to the content of expression, . . . then the regulation falls outside the scope of the *O'Brien* test.").

Even if intermediate scrutiny were to apply, the government could not meet its burden of justifying Section 2511(1)(c) and Section 2511(1)(d). The interception itself is already separately prohibited in Section 2511(1)(a). The use and disclosure provisions are gratuitous restrictions on speech, and speech alone, penalizing pure expression while providing no clear assurance that they serve any important governmental interest – much less any assurance that they are narrowly tailored means of achieving that interest.

The private respondents speculate that the use and disclosure prohibitions are needed to "dry up the market" for illegally intercepted communications. Peavy Opp. Cert. at 18. Conceivably so. But this Court has repeatedly held that, even

under merely intermediate scrutiny, restrictions on speech cannot be justified by such unadorned conjecture, even if labeled "common sense."[1] It seems equally plausible to assume that few if any eavesdroppers are motivated chiefly by the prospect of delivering the intercepted information to the press. Rather, like Mr. Harman in this case, they are motivated by other considerations and will not alter their behavior as a result of Section 2511(1)(c) and Section 2511(1)(d). It is undisputed that Harman began taping *before* he even approached WFAA-TV, and he continued to tape even *after* WFAA-TV informed him that it would not accept any additional tapes. The only evidence the private respondents are able to muster is hopelessly out-of-date and relates to the technological state of the art in 1968 and 1986. Peavy Opp. Cert. at 14-17. This evidence fails to consider (to take obvious examples) advances in encryption, public key infrastructure, digital phones, and other technological means of protecting privacy short of a total ban on speech.[2]

3. The private respondents contend that petitioners should

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[1] See also *Greater New Orleans Broadcasting Council* v. *United States*, 527 U.S. 173, 188 (1999) (quoting *Edenfield* v. *Fane*, 507 U.S. 761, 770-71 (1993)); *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 505 (1996) (plurality opinion); *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476, 487 (1995); *Ibanez* v. *Florida Dept. of Business & Professional Reg.*, 512 U.S. 136, 143 (1994).

[2] See, *e.g.*, *Hard of Hearing*, NEWSWEEK, Dec. 13, 1999, p. 78 ("Digital transmissions, used for most mobile phones and soon for almost all telecommunications, are harder to intercept than the old analog signals. Whereas analog signals are transmitted in a continuous stream, digital signals are broken into small, hard-to-track packets. E-mail and telephone calls that use the Internet are almost impossible to intercept. While digital packets can be snatched in bulk, reassembling them is very difficult. The sheer volume of global information makes it hard to sort out key words and phrases. Encryption, once rare in everyday commerce and communication, has been made commonplace by software programs that anyone . . . can get. . . . New technology poses obstacles to eavesdropping that may be virtually insuperable.").

have notified the Texas Attorney General that the constitutionality of the Texas wiretap statute has been called into question, under Supreme Court Rule 29.4(c). Peavy Opp. Cert. at 21. Yet the Texas Attorney General is well aware of the petition in this case and has appeared in this Court on behalf of the State of Texas. In fact, respondents fail to note that on November 27, 2000, the Office of the Texas Attorney General informed the Clerk of this Court by letter that the Attorney General waives any response to the petition for writ of certiorari in this matter. It is therefore entirely unjustified for the private respondents to purport to assert the prerogatives of the Texas Attorney General, when he himself has waived any right to respond.

4. Regardless of the outcome of Nos. 99-1687 and 99-1728, this Court should grant plenary review on the second question presented: whether the imposition of liability under 18 U.S.C. § 2511(1)(c) and (d) requires a showing that the defendant "know[s] or ha[s] reason to know that the information was obtained . . . in violation of this subsection." The issue is not, as the private respondents mistakenly contend, an abstract "ignorance of the law" or a "mistake of law" defense. Peavy Opp. Cert. at 21-24. Rather, the question is whether the scienter requirement in the statute allows the defendant to exculpate himself by showing, on the basis of advice from law enforcement authorities, legal counsel, or similarly authoritative sources of information, that he was not aware of the Title III prohibition. By any common sense understanding, a defendant like WFAA or Riggs who has been advised of the lawfulness of his conduct has no "reason to know" that the conduct violates Title III. This defense is built into the scienter requirement itself and does not duplicate the entirely separate affirmative defense of 18 U.S.C. § 2520(d), which accords immunity to otherwise illegal interceptions involving court orders, grand jury subpoenas, requests of law enforcement officers, or good faith determinations of telecommunications service providers.

Our construction of the scienter requirement is more faithful to the statutory language enacted by Congress because it gives meaning to the decision to place the phrase "in violation of this subsection" after the verb "know[s] or ha[s] reason to know[]." By contrast, the Fifth Circuit's interpretation draws an arbitrary line between the defendant's knowledge of underlying facts relevant to lawfulness (regarding which a defendant may put on evidence) and the defendants' actual and reasonable understanding of the legal standard established by Section 2511(1)(c) and Section 2511(1)(d) (regarding which a defendant may not offer proof, according to the Fifth Circuit). Yet the statute does not differentiate between knowledge of underlying facts relevant to lawfulness and knowledge of the governing legal standard.

The Fifth Circuit's reasoning is inconsistent with the approach taken by this Court in analogous situations. See, *e.g.*, *Liparota* v. *United States*, 471 U.S. 419, 425 (1985) (federal statute relating to food stamp fraud (7 U.S.C. § 2024(b)) required proof that the defendant knew his conduct to be unauthorized by the applicable statute or regulations); *United States* v. *Murdock*, 290 U.S. 389, 396 (1933) ("Congress did not intend that a person, by reason of a bona fide misunderstanding as to his liability for the tax, as to his duty to make a return, or as to the adequacy of the records he maintained, should become a criminal by his mere failure to measure up to the prescribed standard of conduct.").

The principal drafter of Title III, Professor G. Robert Blakey, indicated that "good faith mistakes under the statute will not be subject to criminal sanctions. This seems only just in light of the technical character of the Act." G. R. Blakey and J. A. Hancock, *A Proposed Electronic Surveillance Control Act*, 43 NOTRE DAME LAWYER 657, 666 n. 19 (1968) (citing *Murdock*).

Further, the Fifth Circuit's interpretation is intrinsically unreasonable. It would permit liability to be imposed even if the defendant has been assured in writing by the Attorney General herself that the interception in question is entirely lawful under

Section 2511. Cf. *Raley* v. *Ohio*, 360 U.S. 423, 438 (1959); *Lambert* v. *California*, 355 U.S. 225, 227 (1957). The due process principles that such near-entrapment jeopardizes are underscored by the First Amendment rights at stake. If the press cannot rely on authoritative legal advice to confirm the permissibility of traditional methods of newsgathering, there will be an unacceptable risk of chill, timidity, and self-censorship.

At the very least, the statutory language is unclear, and plenary review by this Court is warranted to resolve the ambiguity regarding an important question of federal law. It would be particularly appropriate to grant certiorari to define the contours of the scienter requirement because in *Bartnicki* v. *Vopper*, No. 99-1687, and *United States* v. *Vopper*, No. 99-1728 the government has raised the scienter issue as a means of defending Title III under the First Amendment. Brief of the United States at 45-46.

The Government claims that there is no disagreement in the lower courts over the scienter issue. That is an oversimplification, as even the cases cited by the Government demonstrate. For example, in *United States* v. *Wuliger*, 981 F.2d 1497 (CA6 1992), *cert. denied*, 510 U.S. 1191 (1994) (cited in Govt. Opp. Cert. at 9), the Sixth Circuit, citing *Liparota*, *reversed* the defendant's conviction because "[u]nder section 2511(1)(d), the government must prove beyond a reasonable doubt that the defendant knew or had reason to know that the recordings he used were obtained in violation of the Act." *Id.* at 1509. In *Williams* v. *Poulos*, 11 F.3d 271, 284 (CA1 1993), and *Thompson* v. *Dulaney*, 970 F.2d 744, 749 (CA10 1992) (both cited in Govt. Opp. Cert. at 9), the courts of appeals applied the common-law presumption that every person knows the law but did not address the question presented here: whether a defendant under Sections 2511(1)(c) and 2511(1)(d) may rebut that presumption through authoritative evidence such as that presented by WFAA and Riggs. In that regard, respondents have nothing of substance to say regarding *Kratz* v. *Kratz*, 477 F. Supp. 463 (E.D. Pa. 1979), where the court held that a defendant

had raised an issue of material fact regarding whether a client had reason to know of the illegality of interceptions where the attorney had, after legal research, advised the client that the interceptions were lawful.[3]

The private respondents do not deny that WFAA and Riggs received advice directly from their own counsel that it was legal to intercept and record telephone conversations from a cordless phone, but they dispute whether Harman received similar advice from law enforcement authorities. Peavy Opp. Cert. at 2, 22. The uncontroverted record in this case, however, is that Harman was advised by the Dallas County District Attorney and Dallas Police Department that his actions were legal. Pet. App. 3a, 65a-66a. Respondents rely on the trial record in a different case involving different parties. In any event, the Fifth Circuit's holding on the scienter requirement does not depend on any factual issue. The court of appeals held that petitioners would be liable even if they had received authoritative legal advice that their conduct was lawful. Pet. App. 29a-31a. Any factual disputes can be resolved on remand.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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[3] See 477 F. Supp. at 477 ("[A] defendant cannot be held liable under §§ 2511(1)(c) or (1)(d) unless he or she knew or had reason to know that the information used or disclosed was obtained from interceptions made in violation of § 2511(1). The defendants, of course, maintain that they acted in reliance upon *Simpson* and believed the interceptions were not in violation of § 2511(1). Although we have held that *Simpson* is erroneous, we think that if *Simpson* was the only federal case interpreting Title III which was available to a reasonably diligent attorney at the time Cadmus did his research, then the defendants indeed had no reason to know their conduct was unlawful. * * * [S]ummary judgment cannot be granted with respect to the defendants' liability under §§ 2511(1)(c) and (1)(d).").

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